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# In the Supreme Court

OF THE

## United States

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OCTOBER TERM 1978

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No.

**78-1366**

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JOHN J. COSTELLO and FLOYD E. STEVENS,  
*Petitioners,*

VS.

THE UNITED STATES,  
*Respondent.*

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### PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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JOHN J. COSTELLO and FLOYD E. STEVENS,  
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vs.

THE UNITED STATES,  
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**PETITION FOR A WRIT OF CERTIORARI  
to the United States Court of Appeals  
for the Ninth Circuit**

Petitioners, Costello (76-2004) and Stevens (76-2005), seek money damages from respondent. Their complaints were assigned to the same judge, as cases related within the meaning of Local Rule 101 of the Northern District of California. Both complaints were dismissed, and timely notices of appeal were filed. The appeals were consolidated by the Ninth Circuit, and were resolved in a single opinion.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Ninth Circuit.

### OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. A-1 et seq.) is reported at 587 F.2d 424. The opinion of the District Court (App. B, *infra*, pp. B-1 et seq.) is not reported.

### JURISDICTION

The judgment of the Ninth Circuit was entered on October 26, 1978. A timely petition for rehearing and hearing en banc was denied on December 7, 1978 (App. C, *infra*, p. C-1), and this petition for certiorari was filed within 90 days of that date. Jurisdiction of this Court is based on 28 U.S.C. § 1254(1) and the United States Constitution, Article III, § 2, cl. 2. Jurisdiction of the district court is based on the Tucker Act, 28 U.S.C. § 1346(a)(2).

### QUESTIONS PRESENTED

1. Whether petitioners have contractual right in the method of computation of their earned retired pay prescribed by the statutes in effect (a) during the performance of their required service in the uniformed military services of the United States, and (b) upon the respective dates of their retirement?

2. Whether petitioners are entitled to just compensation for the portion of their earned retired pay which has been abrogated by Congress?

### STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

In 1956, Congress codified into positive law the long-standing system of recomputing the pay of retired mem-

bers of the armed forces whenever active duty base pay scales were increased or decreased. (See former 10 U.S.C. §§ 1401, 3991, 6149, 6151, 6325-27, 6381, 6383, 6390, 6394, 6396, 6398-6400, 8991, 70A Stat. 106, 232, 385-86, 394-96, 404-06, 410-11, 413-14, 556-57.) These provisions were repealed in 1963 by § 5 of P.L. 88-132, 77 Stat. 210, 212-15. An example of the 1956 provisions, and the Fifth Amendment to the United States Constitution, are set forth in App. D, *infra*, p. D-1.

### STATEMENT OF THE CASE

Costello is a retired United States Army officer. Stevens is a retired enlisted member of the United States Navy. Both retired while the statutory recomputation system was in full force and effect. Stevens' active service was rendered pursuant to successive written contracts with respondent. This is the only material factual difference between petitioners' claims.

The following facts alleged by petitioners have not been denied by respondent, and must, therefore, be taken as admitted for the purpose of this petition. (*Gardner v. Toilet Goods Ass'n* (1957) 387 U.S. 167, 172; *Brown v. Brown* (9th Cir. 1966) 368 F.2d 992.)

Beginning with the Act of July 15, 1870, § 24, 16 Stat. 320, for officers, and with the Act of February 14, 1885, 23 Stat. 305, for enlisted personnel, retired pay for military service was (1) computed as a fixed percentage of the base pay (exclusive of allowances and other benefits) for the rank or grade held at retirement, and (2) recomputed

thereafter whenever active duty base pay for that rank or grade increased or decreased.<sup>1</sup>

Respondent represented to petitioners that a principal advantage in their choice of a military career was the long established right to recompute their retired pay. Respondent assured them that such right would guarantee them a level of pay after retirement directly corresponding to that enjoyed by those on active duty.

Respondent continuously reaffirmed the recomputation system during petitioners' active duty service, particularly by each successive pay statute prescribing increases of active duty pay and corresponding increases in retired pay.

In consideration of the lengthy statutory implementation of the recomputation system, petitioners agreed to join and remain in their chosen services, thereby making career commitments to those services. These commitments were the intended result of the recomputation system and of the recruitment and procurement efforts based upon the continued existence of that right.

On August 10, 1956, Congress codified the historic method of measurement of retired pay by requiring recomputation automatically whenever active duty pay scales were thereafter changed. Thereafter, on December 7, 1956, petitioner Stevens last enlisted in the United States Navy.

<sup>1</sup>While in recent years base pay has been consistently increased, in the past it has been reduced, and retired pay was reduced, proportionately. (See *Federal Staff Retirement Systems*, Sen. Doc. No. 14, 90th C., 1st S., pp. 371-72 (1967) [pay of officers reduced 38½% and pay of enlisted personnel reduced 30% between 1932 and 1935]. See also *Hearings on Recomputation and Other Retirement Legislation*, H.A.S.C. No. 92-78, 92d C., 2d S., pp. 17341-44 (1972).)

Having fully performed their active duty commitments to the United States, Stevens was transferred to the Fleet Reserve, at the grade of E-7, on August 15, 1961, which was equivalent to retirement for purposes of pay, and Costello was transferred to the retired list of the United States Army on May 31, 1963, at the rank of O-4. The retired pay of both petitioners was initially computed, therefore, while the 1956 statutory provisions for recomputation were still in full force and effect.

On October 2, 1963, Congress repealed the 1956 provisions of Title 10, which had codified the recomputation system. (77 Stat. 212-15.) As applied to petitioners, the 1963 Act retroactively deprives them of their right to recompute their retired pay in accordance with the statutes in effect during their entire service and when they retired. Congress so acted solely for fiscal reasons—to reduce retired pay and to provide funds for increased active duty pay.

Petitioners have each suffered a substantial monetary loss, measured by the difference between the amount of pay they would have received since the respective dates of their retirements under the recomputation system, as then codified in Title 10, and the amount of pay they actually have received under the 1963 Act, enacted after their respective retirements.

## REASONS FOR GRANTING THE WRIT

### 1. THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF THE HIGHEST COURT OF EVERY COMMUNITY PROPERTY STATE THAT HAS CONSIDERED THE NATURE OF MILITARY RETIRED PAY.

The opinion below holds that petitioners' military retired pay is continuing pay for continuing, but reduced service. (*Costello v. United States* (1978) 587 F.2d 424, 425, 427.) Of the eight community property states, all but Nevada—which has not passed on the issue—hold that retired military pay is deferred compensation for past services. (*Van Loan v. Van Loan* (1977) 116 Ariz. 272, 273, 569 P.2d 214, 215; *In re Marriage of Fithian* (1974) 10 C.3d 592, 604, 111 C.Rptr. 369, 376, 517 P.2d 449, 456, *cert. den.* 419 U.S. 825; *Ramsey v. Ramsey* (1975) 96 Idaho 672, 675-76, 535 P.2d 53, 56; *LeClert v. LeClert* (1969) 80 New Mex. 235, 236, 453 P.2d 755, 756; *Cearley v. Cearley* (Tex. 1976) 544 S.W.2d 661, 662; *Wilder v. Wilder* (1975) 85 Wn.2d 364, 366, 367, 534 P.2d 1355, 1357.) The highest court of Louisiana has not directly considered the issue, but an intermediate appellate court of that state has also held that retired military pay is deferred compensation for past services. (*Swope v. Mitchell* (La.App. 1975) 324 So.2d 461, 463; cited with approval in *Sims v. Sims* (La. 1978) 358 So.2d 919, 922.) (See also *Bodenhorn v. Bodenhorn* (5th Cir. 1978) 567 F.2d 629, 630 [approving the reasoning of the above cases].)<sup>2</sup>

<sup>2</sup>The nature of such pay is also raised in common law states. Thus, such pay has been held to be fully earned, and, therefore, a marital asset subject to division on divorce. (See, e.g., *Kruger v. Kruger* (1977) 73 N.J. 464, 470, 375 A.2d 659, 663; *Chisnell v. Chisnell* (1978) 82 Mich. App. 699, 706, 155 N.W.2d 155, 159.)

Thus, there is a direct conflict between these state court decisions and the decision of the Ninth Circuit below. The nature of military retired pay is a federal question, and, as demonstrated in Point 2, D, *infra*, this conflict can be resolved only by this Court.

### 2. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IMPORTANT AND PRESSING CONSTITUTIONAL QUESTION WRONGLY DECIDED BY THE NINTH CIRCUIT.

#### A. The decision below rests on an outmoded characterization of military retired pay.

The Ninth Circuit characterizes petitioners' retired pay as compensation for continuing military service, relying primarily upon *United States v. Tyler* (1881) 105 U.S. 243.<sup>3</sup> Assuming that characterization was appropriate in 1881, it is no longer supported by law or reason.

The statutory basis for the decision—the distinction between retired and wholly retired officers (see Rev. Stat. §§ 1274, 1275)—no longer exists. In *Tyler* the issue was whether the retired officer was “in the service” within the meaning of the applicable 1870 statute. This question turned on the distinction between officers retiring from ac-

<sup>3</sup>The opinion below also quotes from *Lemly v. United States* (1948) 75 F.Supp. 248, 109 Ct.Cl. 760, and *Abbott v. United States* (1973) 200 Ct.Cl. 384. The statement quoted in *Lemly* was dictum. Furthermore, it was directed to the Government's argument that retired pay granted reservists disabled while on active duty under a special 1940 statute was a pension, a fact which allegedly deprived the Court of Claims of jurisdiction. (109 Ct.Cl. at 761, 763.) The Court of Claims noted the question in *Abbott* and simply stated that its prior holdings were dispositive. (200 Ct.Cl. at 389-40.) But in none of the prior holdings did that Court reject a claim that retired pay was deferred compensation.

tive service and those "wholly retired." The Court held that since Tyler was not "wholly retired," he was still in the service and entitled to pay increases authorized for officers on active duty under the statutes in effect at the time of his retirement.

Since the distinction between those "wholly retired" and those merely retired from active duty no longer exists, there is no reasonable basis for the conclusion today that those retired from active duty are not "retired" in the normal sense of that term.

The statutes governing modern military service and retirement, in fact, are totally inconsistent with the Ninth Circuit's characterization of retired pay as compensation for continuing service:

(1) Retired members of the regular Navy and Marine Corps are subject to recall only in time of war or national emergency. (10 U.S.C. § 6481.) Retired members of the regular Army and Air Force are subject to recall at any time. (10 U.S.C. §§ 3504(a), 8501(a).) *If petitioners' pay were for current service, such different obligations should be reflected by different pay. Yet retired pay of all is measured in an identical manner.* (10 U.S.C. §§ 3991, 6325, 8991.)

(2) "Ready" and "standby" reservists may be ordered to active duty only in time of war or national emergency or when otherwise authorized by law. (10 U.S.C. §§ 672-74.) "Select" reservists may be ordered to active duty more readily, i.e., when the President determines that it is "necessary to augment the active forces for any operational mission." (10 U.S.C. § 673(b).) Inactive status and retired

reservists may be ordered to active duty under more restrictive circumstances. (10 U.S.C. § 672. Cf. 10 U.S.C. § 1335 [inactive status reservist may be recalled to active status at any time].) *Reservists, then, are at least equally, and probably more, likely to be called to active duty than retired members of the regular services. Yet they receive no pay for their "standby" service, unless they are entitled to retired pay.* (37 U.S.C. § 204(a)(1) and (g) [pay for active duty, and disability incurred in active duty]; 10 U.S.C. § 1331 [retired pay].) *Reservists are not entitled to retired pay until age 60, no matter when they complete the requisite 20 years reserve or active duty.* (10 U.S.C. § 1331.) *Regular members of the armed forces, like petitioners, receive retired pay immediately on "retirement," as early as age 37. If petitioners' pay were for their current, "standby" services, reservists would similarly be paid for their standby service.*

(3) Regular members are involuntarily "retired" in mid-life, and suffer second career income losses. Such losses are not suffered by reservists (or civil service counterparts). (Report of the First Quadrennial Review of Military Compensation, Vol. IV, pp. S-15, 2-10; Vol. V, pp. II-1, 2 & 10, VII-16, VIII-6 (1969).) This fact explains (a) the difference in treatment between reservists and regular members of the uniformed services noted above, and (b) the fact that the retired pay of regular members is measured without regard to differences in their standby obligations.

When Tyler was decided, the Army included one general, one lieutenant general, three major generals, and six brigadier generals. (Rev. Stat. § 1094.) The present size of the

military forces is one indication of the changes in the military services that have occurred in the intervening one hundred years. The intellectual and technical demands of military service were also entirely different in 1870 from today, *i.e.*, the needs for changing special skills which spawned the variable reenlistment bonuses that were the subject of *Larionoff, infra*. When *Tyler* was decided there were no reserve forces. Such forces were first established in 1916 for the Navy. (See Federal Staff Retirement Systems, Sen. Doc. No. 14, 90th C, 1st S., p. 367 et seq.) Today reserve forces, not retired members, are the principal backup force for the active services.

Thus, whatever the merit of the *Tyler* view of retired military pay in 1870, today

" . . . military retirement pay must be realistically viewed as compensation for past, not present, services. . . . [T]he amount of retirement pay a serviceman receives bears no relation to any continuing duties after retirement, but is calculated solely on the basis of the number of years served on active duty and the rank attained prior to retirement. (10 U.S.C. § 6323(e).) Moreover, should the serviceman actually be recalled to active duty, he is not only additionally compensated according to the active duty pay scale, but his rate of retirement pay is also increased thereafter. (10 U.S.C. § 1402.) The conclusion is inescapable that retirement pay is awarded in return for services previously rendered. . . . "

(*In re Marriage of Fithian, supra*, 10 C.3d at 604, 111 C.Rptr. at 376, 517 P.2d at 456 [Emphasis added].)

Petitioners respectfully suggest that the effect of the Ninth Circuit's conclusion—that retired military personnel

are being paid from fifty to seventy-five percent of their active duty base pay, readjusted for inflation, simply because they wait to be recalled if ever needed—makes no economic or legal sense. Peppercorns may have been good consideration in the Middle Ages, but modern governments do not dispense billions of dollars of public funds annually for so little public benefit.

This Court should, therefore, reconsider the nature of military retired pay in the light of present realities.

**B. The decision below affects adversely the rights of hundreds of thousands of retired military personnel and their spouses.**

The nature of military retired pay is an important public question involving more than these two petitioners. It is of vital importance to every military retired person who completed his or her service after the codification of the recomputation system in Title 10 of the United States Code in 1956 and who retired before the repeal of that law in October, 1963. This group originally comprised approximately 180,000 persons (App. E, *infra*, p. E-1), but has been decreased by the deaths of retirees since 1963. Petitioners have no knowledge of the number of such deaths, but respondent has that information.

Furthermore, the nature of military retired pay is important to spouses of retired military personnel. Under community property law, the earnings of a spouse following a divorce are separate property. (See, *e.g.*, Cal. Civil Code § 5119.) Thus, if retired military pay is current pay for current service, such pay received after divorce cannot be community property.

In addition, the potential impact of the decision below may affect the interests of all career federal personnel. If that decision is allowed to stand, Congress will be able to repudiate accrued rights of civilian as well as military personnel.

**C. Serious constitutional issues are raised by the decision below.**

**1. The constitutional question reserved in Larionoff is presented here.**

In *United States v. Larionoff* (1977) 431 U.S. 864, this Court noted that serious constitutional questions would be presented if Congress deprived a member of the Armed Forces "of pay due for services already performed, but still owing." (*Id.* at 879, citing *Lynch v. United States* (1934) 292 U.S. 571, and *Perry v. United States* (1935) 294 U.S. 330.) The cited cases involved express contractual obligations of the United States—war risk insurance policies (*Lynch*) and liberty bonds payable in gold coin (*Perry*). The instant cases involve claims based upon implied contracts of government personnel to deferred compensation for services performed under statutes defining eligibility for retirement (*i.e.*, required performance) and fixing the method of computing that pay. (See *Mississippi ex rel. Robertson v. Miller* (1928) 276 U.S. 174; *Fisk v. Jefferson Police Jury* (1885) 116 U.S. 131; and *Larionoff v. United States* (1976) 533 F.2d 1167, 1189, on rehearing, *affd.*, *United States v. Larionoff*, *supra*, where the District of Columbia Circuit applied the principles of *Fisk* to earned military pay; *cf. United States v. Tyler*, *supra*, 105 U.S. at 244 holding that "the measure of his [Tyler's] rights"

to increases in his retired pay was the proper construction of the statutes in effect when he retired.) For the reasons stated in Point 2, A, *supra*, petitioners' retired pay is deferred compensation for past services, and, therefore, the issue reserved by this Court in *Larionoff* is presented in the instant case.

**2. Having rendered their prescribed services under statutes which specified the method of computation of their retired pay, petitioners have an implied contractual right to have their retired pay so computed.**

In *Robertson* a Mississippi statute required the state revenue officer (Robertson) to perform a prescribed service—investigate claims for past due income and privilege taxes and file suits to collect those taxes. Robertson's right to compensation, as fixed by the statute, *vested* when he filed a legal action to collect the tax. *The statute also included the method of computing that compensation*—twenty percent of the amount of the past due taxes collected thereafter.

The state amended the original statute to provide that Robertson and his successor (Miller) would share the commissions derived from suits which had been begun by Robertson and which were pending when he was succeeded by Miller. If the original statute had not been amended, Robertson would have been entitled to the entire commission, since his right to compensation vested when the suits were filed. This Court held that when Robertson had rendered the services required by *the statute then in effect*, an implied contract arose entitling him to payment of the

compensation as fixed by that statute. Therefore, the later statute, as retroactively applied to deprive Robertson of a portion of his compensation, was held invalid under the contract clause of Article I, Section 10, of the United States Constitution. (276 U.S. at 179, citing *Fisk v. Jefferson Police Jury*, *supra*.)

In the instant cases, petitioners were required to perform a service—active military duty for the United States for at least 20 years. Their *right* to retired pay, as fixed by the 1956 statutes, *vested* upon completion of their requisite service and became payable upon their being transferred to the retired list (officers) or fleet reserve (naval enlisted personnel). *That right also included the method of computing and recomputing retired pay*—a fixed percentage of active duty base pay for the rank or grade held at retirement and the recomputation of that pay at the same fixed percentage whenever active duty base pay was increased or decreased.

In 1963—after petitioners had completed their requisite service and their right to retired pay had vested—Congress repealed the 1956 provisions prescribing the recomputation method of computing petitioners' retired pay and substituted a different method of computing that pay. If those statutory provisions had not been repealed, petitioners would have received substantially more retired pay than they have received under the 1963 Act. The constitutional principle applied in *Robertson* and *Fisk* compel the conclusion that, such services having been performed pursuant to statute, the rights under the statute in effect at the conclusion of those services is vested, and may not be constitutionally changed without just compensation.

**3. Petitioners are entitled to just compensation for that portion of their earned retired pay which has been abrogated by Congress.**

As stated in the *Sinking Fund Cases* (1879) 99 U.S. 700, 719:

“... The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. . . .”

(See also *Lynch v. United States*, *supra*, 292 U.S. at 579-580; *Perry v. United States*, *supra*, 294 U.S. at 350-354; *Louisville Bank v. Radford* (1934) 295 U.S. 555, 601-602; compare *Hall v. Wisconsin* (1880) 103 U.S. 5; *Home Building & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398, 430-431.)

After petitioners retired, Congress partially abrogated their earned retirement rights to make funds available to increase active duty pay and/or to reduce the cost of retired pay. These goals may be desirable and within the Congress' power, but the abrogation of petitioners' earned retirement rights to accomplish these goals is beyond Congress' power, since such action violates the Fifth Amendment of the United States Constitution. (*Lynch v. United States*, *supra*, 292 U.S. at 579-80; *cf. Robertson*, *supra*.)

**4. The above constitutional principles apply equally to earned retired pay.**

Once their retired pay was earned *pursuant to statute*, petitioners' earned rights may not be constitutionally taken away. (*Bell v. United States* (1961) 366 U.S. 393, 401

[earned military pay may not be forfeited even for criminal conduct].) As this Court's opinion in *United States v. Larionoff*, *supra*, 431 U.S. at 879, recognized:

"... if Congress had such an intent [to abrogate earned rights to military pay], serious constitutional questions would be presented. No one disputes that Congress may prospectively reduce the [unearned] pay of members of the Armed Forces, even if that reduction deprived members of benefits they had expected to be able to earn. Cf. *Bell v. United States*, *supra*; ... It is quite a different matter, however, for Congress to deprive a service member of pay due for services already performed, but still owing. In that case, the Congressional action would appear in a different constitutional light. Cf. *Lynch v. United States*, [*supra*,] ...; *Perry v. United States*, [*supra*,] ..."

In *Larionoff*, the right to reenlistment bonuses were not fully vested, since they would be paid only to the extent that the serviceman completed his extended service. Failure to do so would result in a pro-rata payment of the bonus. (See *United States v. Larionoff*, *supra*, 431 U.S. at 878, footnote 20 ["If for some reason the enlistee did not complete service of his extension, remaining installments were not paid and overpayments were recouped."].) Even though that possibility of divestment existed, each bonus became vested by the enlisted man's commitment to extend the period of enlistment. If in *Larionoff* the right to the VRB was "already earned" (*id.* at 879) when the initial commitment was made, *i.e.*, when the reenlistment agreement was signed, and before full performance, then, *a fortiori*, petitioners' right to "recomputation" was earned

when they fully completed their required 20 years of service and retired.

**D. This court will ultimately have to resolve the conflict between the court below and the decisions of the highest courts of the community property states and should do so in this case.**

The conflict in decisions raised by the Ninth Circuit's opinion is noted in Point 1, *supra*. The consequence of that conflict is readily foreseeable. State courts are not bound to follow the decisions of the court below on questions of federal law. (See, *e.g.*, *People v. Bradley* (1969) 1 C.3d 80, 86, 81 C.Rptr. 457, 460, 460 P.2d 129, 132; *Debtor Reorganizers, Inc. v. State Board of Equalization* (1976) 58 C.A.3d 691, 696, 130 C.Rptr. 64, 67.) The only decision with respect to the nature of military retired pay that will bind both state and lower federal courts is a decision of this Court. Until there is such a decision, counsel for military persons in divorce proceedings not only will, but, in the prudent exercise of their profession, must urge that the retirement benefits of such persons is current pay for current services, and, therefore, not subject to division as community property. Such contentions will be based upon the decision of the Ninth Circuit below. Counsel for the spouses of such persons, for similar reasons, must urge that such retirement benefits are deferred compensation for past services and subject to division as community property. Those contentions will be based upon cases such as *In re Marriage of Fithian*, *supra*.<sup>4</sup> Where parties are represented by knowledgeable counsel, settlement of the divorce litigation involv-

<sup>4</sup>*Fithian* was cited without comment in *Hisquierdo v. Hisquierdo* (1979) 99 S.Ct. 802, 807-08, footnote 14.

ing a military person will be rendered difficult, if not impossible until that issue is resolved. Prudent counsel will preserve their clients' potential rights through the appellate process and petitions for writs of certiorari. Failure to do so will seriously expose counsel in such cases to malpractice claims. (See *Smith v. Lewis* (1975) 13 C.3d 349, 357-59, 118 C.Rptr. 621, 626-27, 530 P.2d 589, 594-95.)

This Court will, therefore, continue to receive petitions to resolve the existing conflict in decisions regarding the nature of military retired pay until that conflict is resolved. The nature of military retired pay is better resolved in this case, where the issue is raised directly and the United States is a party. (Compare the opinion below with *Bodenhorn v. Bodenhorn*, *supra*, where the Fifth Circuit held military retired pay is compensation for past services, with no apparent awareness of the potential federal interests at stake.)

### CONCLUSION

The Ninth Circuit has characterized military retired pay as "pay for continuing service" without any evidence to that effect in the record. This Court should not deprive petitioners of the opportunity to prove what common sense dictates: their retired pay is deferred compensation for past services, and that, therefore, they have a vested right thereto which is constitutionally protected.

The claims of only two petitioners are before this Court. Their claims are shared, however, by all persons in the military services who completed their service prior to the repeal in 1963 of the recomputation system of retirement codified in 1956. The potential impact of the decision, moreover, may affect all career federal personnel.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit in this proceeding.

Dated, March 2, 1979

Respectfully submitted,  
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(Appendices Follow)

## **Appendices**

**Appendix A**

In the United States Court of Appeals  
for the Ninth Circuit

|                           |                      |             |
|---------------------------|----------------------|-------------|
| John J. Costello,         | Plaintiff-Appellant, | No. 76-2004 |
| vs.                       |                      |             |
| United States of America, | Defendant-Appellee.  |             |
| Floyd E. Stevens,         | Plaintiff-Appellant, | No. 76-2005 |
| vs.                       |                      |             |
| United States of America, | Defendant-Appellee.  |             |

[Filed October 26, 1978]

On Appeal from the United States District Court  
for the Northern District of California

**OPINION**

Before: MERRILL and TANG, Circuit Judges,  
and TAYLOR,\* District Judge

MERRILL, Circuit Judge:

Before 1963, the compensation of retired military personnel was calculated with reference to the pay received by those on active duty; when the active duty pay scales increased or decreased, retirement pay was correspondingly

\*Honorable Fred M. Taylor, Senior United States District Judge of the District of Idaho, sitting by designation.

recomputed. In 1963, Congress changed the statute so that adjustment of retirement compensation was tied to the cost of living index, rather than to the active duty pay scales. Appellants are military personnel who retired before the 1963 statutory changes went into effect. They brought suit under the Tucker Act, 28 U.S.C. §1346(a)(2), claiming that they had suffered a monetary loss under the 1963 computation system and that the 1963 Act denies them their property without due process in violation of the fifth amendment. The district court dismissed the complaints for failure to state a claim, finding that appellants did not have any vested right which was denied by the government. On appeal, appellants renew their contentions made below that they have a vested right to recompute their retirement pay in accordance with the law in effect at the time they retired and that the 1963 Act retroactively deprived them of that vested right.

As to vested rights, the distinction between earned military pay and that to be earned in the future has long been recognized. The Supreme Court has recently stated it:

"No one disputes that Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprived members of benefits they had expected to be able to earn. Cf. *Bell v. U.S.*, 366 U.S. 393 (1961); *U.S. v. Dickerson*, 310 U.S. 554 (1940). It is quite a different matter, however, for Congress to deprive a service member of pay due for services already performed, but still owing."

*United States v. Larionoff*, 431 U.S. 864, 789 (1977).

Appellants contend first that the United States is contractually obliged to compensate them under the old law

by the terms of their enlistment contract. *United States v. Larionoff*, *supra*, rejects this proposition. It states:

"Both the Government and respondents recognize that '[a] soldier's entitlement to pay is dependent upon statutory right,' *Bell v. United States*, 366 U.S. 393, 401 (1961), and that accordingly the rights of the affected service members must be determined by reference to the statutes and regulations governing the [compensation], rather than to ordinary contract principles."

431 U.S. at 869. To the same effect is *Andrews v. United States*, 175 Ct.Cl. 561 (1966). The Supreme Court, in *Larionoff*, continues in footnote 7 at page 869:

"Indeed, this is implicitly recognized in the contracts executed by the named respondents, which state that they agree to extend their enlistments 'in consideration of the pay, allowances, and benefits which will accrue to me during the continuances of my service,' rather than stating any fixed compensation."

The language there quoted by the Court is similar to language in the enlistment contracts upon which appellants rely.

We conclude that appellants have no contract right to have their compensation computed under the old law.

Appellants further contend that retirement pay is, in the language of *Larionoff*, "pay due for services already performed but still owing"; that it is deferred compensation for past services.

This proceeds upon the premise that with military retirement all compensable service owing to the government

ceases. This has been established as a false premise since at least 1881.

In *United States v. Tyler*, 105 U.S. 244 (1881), the Court considered a statute that increased the pay of military officers by 10 percent for every 5 years of service. The question presented was whether appellee, a retired captain, was entitled to this pay increase. The Court ruled that Congress had distinguished between officers "wholly retired" whose retirement compensation was fixed at a lump sum, and officers "retired from active service" whose continuing compensation was fixed by statute at "75 per centum of the pay of the rank upon which they are retired." As to the latter, the Court held that "while not required to perform full service, they are part of the army, and may be assigned to such duty as the laws and regulations permit." 105 U.S. at 245. Accordingly it was held that officers retired from active service were entitled to the increase in pay.

The Court of Claims, considering the nature of retirement pay, has arrived at the same result. In *Lemly v. United States*, 109 Ct.Cl. 760, 763 (1948), the court stated:

"Retirement pay \* \* \* is a continuation of active pay on a reduced basis. Even though an officer is retired from active duty and is receiving retirement pay, he is still subject to call to active duty as long as his physical condition will permit. He is still an officer in the service of his country even though on the retired list."

Further, the Court of Claims has reached the same result as to the precise problem before us. Appellants' contention that retirement pay is deferred compensation for past

services was considered and expressly rejected in *Abbott v. United States*, 200 Ct.Cl. 384 (1973).<sup>1</sup>

Appellants contend that all these holdings must be re-examined in the light of the Supreme Court's recent holding in *United States v. Larionoff*, 431 U.S. 864, *supra*.

That case deals with the military re-enlistment bonus. For many years a bonus has been used as an incentive to re-enlistment, being a sum added to the regular duty pay drawn after re-enlistment. With the impact of technology on military service a new incentive was felt necessary to induce re-enlistment of those who had acquired special skills important to the service. Congress authorized the armed services to provide such incentive by regulation. Pursuant to statute, certain skills were enumerated by regulation as entitled to Variable Re-enlistment Bonus (VRB) in addition to the Regular Re-enlistment Bonus (RRB) theretofore paid. By regulation it was provided that those enlisted men with such skills who re-enlisted or by contract extended the period of enlistment would be entitled to award of the VRB. It was provided, however, that the crucial date in determining entitlement to the award was the date of termination of the original enlistment and commencement of the new, or extended, enlistment. The serviceman must on that date be possessed of a special skill entitling him to the VRB.

<sup>1</sup>Appellees rely on *Commissioner v. Wilkerson*, 368 F.2d 552 (1966), as indicating that this court considers military retirement pay to be compensation for past rather than continuing service. There is no merit in this assertion. In its broadest reading, *Wilkerson* holds that military retirement pay received by a retiree who established his domicile in a community property state a few months before retirement is community property for purposes of the retirement income credit.

Appellees in *Larionoff*, serving their original term of enlistment in the Navy, engaged in study to acquire a special skill enumerated among those entitling the possessor to a VRB. They entered into contracts extending their enlistments. Before their original terms of service had expired the Navy amended its list of qualifying skills to exclude the skills acquired by them, feeling that there was no longer any special need for such skills. Appellees sued, contending that this retroactively deprived them of a vested right to the VRB. The court of appeals agreed and the Supreme Court affirmed. Appellants here contend that if a right to the VRB there became vested at the time the contract extending enlistment was signed, their right to retirement pay vested at the time of retirement, the vesting carrying with it the method of computation then applying.

We cannot agree that *Larionoff* compels that result. There are several points of difference.<sup>2</sup> We rely on but one.

<sup>2</sup>In *Larionoff* the Court did not reach any question of due process. It was involved in construction of the statute under which the service's regulations had been promulgated. It stated:

"The intention of Congress in enacting the VRB was specifically to promise to those who extended their enlistments that a VRB award would be paid to them at the expiration of their original enlistment in return for their commitment to lengthen their period of service. When Johnson made that commitment, by entering an agreement to extend his enlistment, he, like Larionoff, became entitled to receive at some future date a VRB at the award level then in effect (provided that he met the other eligibility criteria). Thus, unless Congress intended, in repealing the VRB program in 1974, to divest Johnson of the rights he had already earned, and constitutionally could do so, the prospective repeal of the program could not affect his right to receive a VRB, even though the date on which the bonus was to be paid had not yet arrived."

431 U.S. at 878-79. The Court concluded that Congress had no such intent and that the regulations having that effect were "contrary to the manifest purpose of Congress in enacting the VRB

In *Larionoff* the Court concluded that the VRB was earned when the serviceman had committed himself to an extension of his service. It was not a raise in pay to be earned as service was performed; it was a bonus, fully earned upon commitment. Here, as we have held, retirement pay does not differ from active duty pay in its character as pay for continuing military service. Statutory compensation of this sort for military service can, under *Larionoff* be prospectively altered without offending the due process clause.

Judgment affirmed.

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program, and hence invalid." *Id.* at 873.

The Court did note, however, that had Congress intended to divest Johnson of rights already earned, "serious constitutional questions would be presented." *Id.* at 879. We proceed on the assumption, *arguendo*, that if retirement pay had been fully earned at the date of retirement it could not be divested without compensation.

Further in *Larionoff*, the Court was not presented with a simple change in method of computation. There the benefit was cut off in its entirety. The case did, however, present a change in method. The old RRB and VRB were completely wiped out and supplanted by an SRB (Selective Re-enlistment Bonus). We do not know what, if any, difference in amount of incentive resulted as to any particular skill. All we know is that under the new regulations the particular skill in question was not entitled to any bonus at all. Here, retirement pay was not cut off. The right which appellants claim to have vested in them is a right to a method of computation, not the right to receive a set amount of compensation.

**Appendix B**

United States District Court  
Northern District of California

|                           |            |                  |
|---------------------------|------------|------------------|
| Floyd E. Stevens,         | Plaintiff, | No. C-75-1918 SC |
| vs.                       |            |                  |
| United States of America, | Defendant. |                  |
| John J. Costello,         | Plaintiff, | No. C-75-1919 SC |
| vs.                       |            |                  |
| United States of America, | Defendant. |                  |

[Filed March 16, 1976]

**MEMORANDUM DECISION**

These cases are related pursuant to Local Rule 101. Stevens, formerly an enlisted member of the Navy, now retired, filed his suit in his own behalf and in behalf of all similarly situated enlisted members of the uniformed services to recover retired pay based on the active duty pay rates applicable to them, respectively, at the time of their retirements, plus all statutory active duty pay increases since their retirements to the present time. Costello seeks the same relief for himself, a retired Army officer, and all similarly situated officers of the uniformed services. Both

plaintiffs have waived any recovery in excess of \$10,000.<sup>1</sup> Jurisdiction is founded on 28 U.S.C. § 1346 (a)(2). Both C-75-1918 and C-75-1919 are before this court on the defendant government's motion to dismiss the complaint, or, in the alternative, to grant summary judgment to the defendant. After considering the parties' oral arguments, and the briefs, memoranda, and other written materials submitted before, during and after oral argument, it is the opinion of this court that the complaints must be dismissed for failure to state a claim upon which relief can be granted.

These cases are not without historical antecedents, see *Andrews v. United States*, 175 Ct.Cl.561 (1966) and *Abbott v. United States*, 200 Ct.Cl.384 (1973), cert.denied 414 U.S. 1024 (1973).<sup>2</sup> The pertinent facts set forth infra are drawn from the factual recitations in those cases.

<sup>1</sup>Query whether this creates an adversity between plaintiffs and the classes they desire to represent? In any event, it will not be necessary to certify or reject these cases as class actions, as will become evident.

<sup>2</sup>In *Andrews* retired military officers sought the same relief as the plaintiffs here, claiming that to deny it to them was a violation of their Fifth Amendment rights. Noting the existence of strong authority for the proposition "that officers have no vested or contractual right to any particular amount of retired pay", 175 Ct.Cl. at 563, the Court of Claims ruled the complaints failed to state a claim and ordered them dismissed. In *Abbott* 2,079 retired military personnel requested the same relief as the plaintiffs in *Andrews* and the plaintiffs here, on the same constitutional ground, the Fifth Amendment. The complaints in *Abbott* apparently elaborated more theories than the complaints in *Andrews*, see *Abbott*, 200 Ct.Cl. at 389-390, although not necessarily more than the Court of Claims considered. Noting that "no property has been taken from [plaintiffs] by the government", 200 Ct.Cl. at 390, the Court of Claims determined to follow its earlier ruling in *Andrews* on the basis of the stare decisis rule and ordered the complaints dismissed.

In 1870 Congress established what is known as the "re-computation" system for determining retired pay of retired officers of the Armed Services, Ch.294, § 24, 16 Stat.320. In 1885 this was extended to enlisted personnel, 23 Stat.205. Later on the system was extended to various other departments and grades. The recomputation system provided in general that the retired pay of an officer or enlisted person would be computed as a percentage (e.g., 75%) of the active duty base pay being paid for the rank or grade he held at the time of his retirement, and such retired pay would be "recomputed" from time to time so as to allow him to maintain the same percentage of current active duty base pay provided for military personnel of the same rank or grade in active service. In other words, after his retirement, each retiree would get an increase in his retirement pay based on each increase of active duty base pay provided from time to time by statute for officers or enlisted personnel of the same rank and grade in the active service. This recomputation system continued through the years and was incorporated by Congress in the recodified Title 10, U.S.C. in 1956. This system was law until 1958 when Congress enacted an amendment to the Career Compensation Act (May 20, 1958), Pub.L.No.85-422, 72 Stat.122) which provided on the one hand a 6½% increase in active duty pay, but on the other hand only 6% increase in retired pay. This statute had the effect of suspending, but not repealing the 1956 provisions of Title 10, U.S.C., mentioned above, which provided for the "recomputation" system of retired pay. The 1958 Act only deprived retired persons of approximately ½% of what they would have received under the previously existing recomputation system. However, on Oc-

tober 1, 1963, the Uniformed Services Pay Act of 1963 was enacted (Pub.L.No.88-131, 77 Stat.210). The 1963 Act repealed the provisions of the 1956 Act (Title 10, U.S.C.) which required recomputation and established the new system that is the target of both plaintiffs' complaints. The new system is a "cost of living" system that is tied to the Consumers Price Index. Under the 1963 Act military personnel who, like the plaintiffs in these cases, retired after June 1, 1958, received retired pay equal to the sum of a percentage (e.g. 75%) of the active duty base pay they were receiving for their respective ranks or grades at the time of their retirement, plus a percentage of all increases after their retirement in the Consumers Price Index over a specified level. The difference between this new system and the old is that no longer do retired military personnel get any benefit because an increase in active duty base pay is given to their active duty counterparts. Instead, they only get a raise when the cost of living index rises more than a prescribed amount.

The plaintiffs complain that what they have received since 1963 by way of retirement pay under the "cost of living" system is far below what they would have received under the old "recomputation" system. They seek to recover some or all of this difference on the theory either that the differential has been taken from them by the Congress without due process of law contrary to the Fifth Amendment of the Federal Constitution or that it was a taking by the government of private property for a public purpose without just compensation, also contrary to the Fifth Amendment. Whether or not the plaintiffs have a vested

right in the former recomputation system of retirement pay is the key issue in these lawsuits.

Contract rights are one category of vested rights. Plaintiff Costello acknowledges that he, like all officers in the armed services, did not sign a written agreement with the government concerning his military service. Nevertheless, he maintains there existed an oral contract between himself and the government, including the Congress, as a result of oral representations made to him by the Army that in return for his continued service he would, upon retirement, be given retirement pay figured on a recomputation basis. Plaintiff Stevens alleges the existence of a similar oral contract between himself and the government. In addition, Stevens points out that he, like all enlisted personnel, signed a written agreement to serve. Stevens argues that this written agreement covers the matter of retirement pay and mandates the recomputation system by virtue of the following standard language in the agreement:

For and in consideration of the pay or wages due to the ratings which may from time to time be assigned me during the continuance of my service, I agree to ....

The plaintiffs conclude their argument by referring to the reasoning of the district court in *Carini v. United States*, No. 74-88-NN (E.D.Va., decided January 17, 1975), rev'd No. 75-1399, decided Dec. 19, 1975, ..... F.2d ..... (4th Cir. 1975). In *Carini* the plaintiffs complained that Congress could not change the system for determining re-enlistment bonuses applicable to them *after* they had committed themselves to re-enlistment but *before* they had received the bonuses. The district court said that the plain-

tiffs' suit fell between two distinct, and mutually exclusive, lines of cases. On the one hand were those cases holding that in regard to the handling of military personnel, Congress has broad authority pursuant to its war powers. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The second line of cases, unrelated to military personnel, holds that Congress does not have the authority to alter the terms of a contract between itself and other parties where the change is effected for purely fiscal reasons. See, e.g., *Lynch v. United States*, 292 U.S. 571 (1934). The district court held that the law regarding re-enlistment bonuses in effect at the time the plaintiffs signed their re-enlistment contracts became a part of those contracts, and further, that those cases prohibiting Congress from altering the terms of contracts for purely fiscal reasons applied rather than those cases affording Congress broad power in the handling of military personnel. Stevens and Costello urge this court to follow the same reasoning.

Regrettably, the key premise of plaintiffs' argument is incorrect. The plaintiffs have no contract with the government, including the Congress, regarding their retirement pay. While Stevens argues that the recomputation system became a part of his written enlistment agreement, it is clear that it did not. That agreement was said to be in consideration of the "pay . . . [that] may from time to time be assigned me." There is no reference to determining retirement pay according to a recomputation system. Indeed, there is no specification as to the amount of pay at all. On its face—and particularly in view of Stevens' promise "to comply with and be subject to such laws [and] regulations, as are or shall be established by the Congress"—the con-

tract seems to mean that Stevens will receive the pay authorized by statute from time to time as he performs his service. Cf. *Carini v. United States*, No. 75-1399, at 6, \_\_\_\_ F.2d \_\_\_\_, \_\_\_\_ (4th Cir. 1975). And, more importantly, the Supreme Court has unequivocally stated both that "common law rules governing private contracts have no place in the area of military pay" and that a soldier's entitlement to pay is dependent upon statutory right." *Bell v. United States*, 366 U.S. 393, 401 (1961).<sup>3</sup> In short, the plaintiffs cannot support the alleged existence of a vested right in their retirement pay by contending they have a contract concerning the matter with the government or any branch of it.

Plaintiffs' second argument is that they have a vested right in the recomputation method of determining retirement pay, because the nature of retirement pay is "deferred compensation for past service rendered." They contend this is the appropriate characterization of military retirement pay because (1) at the height of his productivity a career member of the services may be involuntarily retired, forcing him to make a late entry into a second career presumably at a lower compensation level, and (2) a purpose of military retirement pay is to afford an old age annuity. This proposed description of military retirement pay conflicts with the notion which has prevailed for almost a century that military retirement pay is reduced pay for reduced but continuing service. See, *United States*

<sup>3</sup>The district court in *Carini* assumed *sub silentio* that re-enlistment bonuses were not military pay and therefore did not consider *Bell v. United States*, 366 U.S. 393 (1961), and its progeny. It was on this point that the Fourth Circuit reversed the District Court, *Carini, supra*, No. 75-88-NN, at 6, \_\_\_\_ F.2d at \_\_\_\_.

*v. Tyler*, 105 U.S. 244 (1882); *Lemly v. United States*, 75 F.Supp. 248 (Ct.Cl. 1948); compare, e.g. 10 U.S.C. § 802(4) (members of the uniformed services receiving retired pay remain subject to military jurisdiction).

But in the opinion of this court determining whether military retirement pay is "compensation for past service" or "reduced pay for continuing, reduced service" is not of controlling value in resolving the issue at hand. The question is whether, after drawing every inference from the complaints in their favor, plaintiffs have alleged a deprivation of a vested right. This they have not done. Even assuming that military retirement pay is deferred compensation for past service, it still remains for plaintiffs to allege a right to a particular property. There are no contracts between plaintiffs and the government concerning this matter. And, while plaintiffs point out that a portion of each of their active duty pay checks was withheld to assist the funding of their retirement benefits, they do not claim that retirement pay has ceased. At best, the implication is that they are not getting back the contributions to their retirement fund as fast as they prefer. Furthermore, because the Congress has unfettered discretion to set pay rates for active duty personnel—a point which plaintiffs do not dispute—they would never have a claim to a specific amount of retirement pay under the recomputation system, just as active duty personnel have no claims to specific active duty pay rates. It is an undisputed fact that the Congress has reduced active duty pay in the past. See *Federal Staff Retirement Systems*, Sen.Doc.No.14, 90th Cong. 1st Sess., pp.371-372 (1967) (pay of officers reduced 38⅓% and pay of enlisted personnel reduced 30% between 1932

and 1935). The legal tenuity of these complaints is perhaps best revealed by observing that Congress could reduce active duty pay to a point where it is equally or more advantageous for plaintiffs to receive retirement benefits under the cost of living system. It then becomes apparent that what plaintiffs are in essence complaining about is that as yet this has not occurred. See *Abbott v. United States*, supra, 200 Ct.Cl. at 390.

Since plaintiffs have no vested right in what they seek, they cannot complain of being deprived of their property or having their property taken for governmental use. Accordingly, the complaints in C-75-1918 and C-75-1919 fail to state a claim upon which relief can be granted. The complaints are hereby dismissed. Judgment shall be entered accordingly and the parties will bear their own costs.

Dated: March 16, 1976.

/s/ Samuel Conti  
United States District Judge

### Appendix C

In the United States Court of Appeals  
for the Ninth Circuit

|                           |                      |             |
|---------------------------|----------------------|-------------|
| John J. Costello,         | Plaintiff-Appellant, | No. 76-2004 |
| vs.                       |                      |             |
| United States of America, | Defendant-Appellee.  |             |
| <hr/>                     |                      |             |
| Floyd E. Stevens,         | Plaintiff-Appellant, | No. 76-2005 |
| vs.                       |                      |             |
| United States of America, | Defendant-Appellee.  |             |

[Filed December 7, 1978]

### ORDER

Before: MERRILL and TANG, Circuit Judges, and  
TAYLOR, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Tang has voted to reject the suggestion for a rehearing en banc and Judges Merrill and Taylor have recommended such rejection.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

### Appendix D

Former 10 U.S.C. § 6149, 70A Stat. 385, enacted August 10, 1956, provided:

Except for officers whose retired pay is computed under the Pay Readjustment Act of 1942 (56 Stat. 359), the retired pay of each retired officer of the Navy or the Marine Corps shall be computed on the basis of rates of pay provided by law, at the time of his retirement, for officers on the active list. If *after the retirement* of any such officer the rates of pay for officers on the active list are changed, the *retired pay* to which the officer is entitled *shall be recomputed on the basis of the new rates*. (Emphasis added.)

Similar provisions were also incorporated in the statutes cited on page 3, *supra*.

The relevant portions of the Fifth Amendment of the United States Constitution are:

No person shall . . . be deprived of . . . property without due process of law; nor shall private property be taken for public use, without just compensation.

**Appendix E**

National Association for Uniformed Services  
956 North Monroe Street  
Arlington Virginia 22201  
(703) 525-3710

5 June 1973

Dodge—Reyes & Brorby—Kahn & Driscoll  
1501 N. Broadway  
Walnut Creek, CA 94596

Gentlemen:

Per our last telephone conversation, here is the information you requested.

Number of all retirees as of June 30 for years shown:

|      |         |
|------|---------|
| 1958 | 213,557 |
| 1959 | 228,389 |
| 1960 | 253,695 |
| 1961 | 289,794 |
| 1962 | 325,481 |
| 1963 | 378,509 |

OSD does not have exact figures, but their *estimate* for 1 June 1958 is 212,404 and for 1 October 1963 is 391,517.

I should mention that these figures represent everyone drawing a retirement check from DOD. It does not include

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those who waive retirement pay to draw VA compensation.  
Their checks come from the VA.

Sincerely,

/s/ Robert B. Laurents  
Robert B. Laurents  
Col USAF Ret  
Legislative Counsel